

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

MONSANTO COMPANY and
MONSANTO TECHNOLOGY LLC,

Plaintiffs,

VS.

E.I. DUPONT DE NEMOURS AND
COMPANY and
PIONEER HI-BRED INTERNATIONAL,
INC.,

Defendants.

Case No. 4:09-cv-00686-ERW

DECLARATION OF THOMAS F. FLEMING

I, Thomas F. Fleming, declare as follows:

1. I have personal knowledge of the facts set forth in this declaration which I submit in connection with the Court’s consideration of the Electronically Stored Information Stipulation (“ESI Stipulation”).

2. I am a partner in Kaye Scholer LLP, attorneys for DuPont & Pioneer in this action, and have appeared for DuPont & Pioneer since the commencement of this action in May 2009.

3. I, along with Amy Mauser and Cynthia Christian, partners at Boies Schiller & Flexner LLP, also attorneys for DuPont & Pioneer, were involved in the negotiations of the ESI Stipulation with attorneys for Monsanto, which were primarily John Rosenthal and Steve Spears.

4. The language of paragraph 7 of the ESI Stipulation was the end product of multiple proposals and drafts exchanged between the parties. Given how large corporations operate, and how their integrated computer systems function, we understood that responsive documents or

ESI could reside in central files, archives or shared servers (“shared data locations”) used or accessed by custodians in their work, although not in any one person’s name.

5. The discussion and countering drafts of the ESI Stipulation including paragraph 7 continued long after the December 2009 meet and confer of the parties. The last such drafts were exchanged several months later in March-April 2010. The parties’ ultimate agreement on the custodial protocol to be followed here was memorialized in the Paragraph 7, which has remained unchanged since then.

6. The language of Paragraph 7 of the ESI Stipulation provided that the parties would make reasonable inquiries of the custodians to identify or locate central files, archives and shared servers (“shared data locations”) where potentially relevant documents and ESI used, accessed and relied on by those custodians in their work.

7. Based on the ESI Stipulation agreed to by the parties, DuPont & Pioneer followed a protocol for the custodian interviews intended to identify where possibly relevant hard copy documents and ESI may be located. I was in large part responsible for creating this protocol. This protocol included asking custodians about where they personally stored or accessed ESI that may contain responsive documents; and to identify central or shared locations, if any, where potentially-relevant documents and ESI were stored or accessible as used in their work.

8. From these interviews, custodians identified certain such shared data locations, including Sharepoint systems and certain LAN network systems. I understand that rather than reviewing only the specific “file paths” where the interviewed custodians personally stored documents, DuPont & Pioneer reviewed the file names of the folders maintained in Pioneer’s Sharepoint and certain LAN systems. From this process, more than 100,000 pages from DuPont’s & Pioneer’s Sharepoint system were produced. I further understand that custodians

identified certain other shared data locations, such as the LCSoybean, LCoilseeds, and Pbbeanjh LAN files, which are central file spaces on a Pioneer server, as potentially containing relevant documents. From these LAN files more than 250,000 pages of documents were produced.

9. It is my understanding that in all, DuPont & Pioneer produced to Monsanto over 700,000 pages from these and other shared data locations, based on the identification of such shared data locations by DuPont & Pioneer custodians.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on February 9, 2011

/s/ Thomas F. Fleming

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CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2011, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing under seal and also sent the foregoing document via email to the following ECF registrants:

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/s/ C. David Goerisch